Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity	)	
	)	

To: The Commission

COMMENTS OF
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE
CENTER FOR CREATIVE VOICES IN MEDIA
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.,
NATIONAL HISPANIC MEDIA COALITION
COMMUNICATIONS WORKERS OF AMERICA, FREE PRESS,
U.S. PIRG

Media Access Project, on behalf of the above captioned organizations (collectively, NAMAC, *et al.*), hereby submits these Comments in this critical reexamination of the Commission's rules implementing the leased access and protecting independent programmers under Sections 612 and 616 respectively.

SUMMARY

In the ten years since the Commission last visited the rules governing the leased access and program carriage rules, much has changed in the cable industry. Sadly, however, much has also remained the same – or grown far worse. Of relevance here, cable operators have continued to thwart the intent of Congress to create a "genuine outlet for programmers"[1] through stonewalling, rate gouging, and other means both permissible and prohibited to undermine and discourage the use of leased access programming. The complexity of the existing rules coupled with, in the words of Commissioner McDowell "an indolent bureaucracy's failure to obey simple Congressional mandates,"[2] have enabled cable operators to stifle leased access as a meaningful outlet for diverse local, regional, and national programming.

As reflected in the record of this proceeding, cable operators rarely provide responses within the mandatory time frame required by the Commission's rules. When cable operators do respond, they negotiate from a position of overwhelming strength, using their superior resources and information to charge rates in excess of the Commission's maximum rate formula. Cable operators then larder these charges with additional fees for unnecessary and undesired services – such $50 to insert a copy of a program tape when a leased access programer would rather provide signal via over the air signal or broadband link.[3] Cable operators retain power over channel placement and tier placement, making it difficult for leased access programmers to create a channel brand and retain viewers. The consolidation of head-ends as a result of

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[1]S. Rep. 102-92, "Cable Television Consumer Protection Act of 1991," at 79 ("Senate Report").

[2]*In re Applications for Assent to the Assignment or Transfer of Control of Licenses Adelphia Communications Corporation, Time Warner Cable, Inc., and Comcast Corporation*, 21 FCCRcd 8230, 8377 (2006) (Separate Statement of Commissioner McDowell).

[3]*See Comments of Reynolds Media Incorporated*, MB Docket No. 07-42, at 4 (filed July 31, 2007).

clustering and state franchising laws increasingly forces small leased access programmers to pay for subscribers they do not want, while the ability to force head-end by head-end negotiation makes it virtually impossible for programmers seeking to launch national or regional programing networks to do so.

When programmers have sought redress at the Commission, they have received the clear and unambiguous message that staff has no interest in enforcing even the existing rules. While staff are quick to dismiss complaints by programmers on technicalities, substantive complaints can take years to resolve – even when they present no new issues of law. *Compare Matthew Tyree v. Comcast Cable Communications*, 19 FCCRcd 2621 (2004) (dismissing within 6 months a complaint as untimely) *with United Production v. Mediacom Communications Corp.*, 22 FCCRcd 1224 (2007) (timely complaint, where cable operator did not file response and complaint relied on agency precedent for virtually identical set of facts previously found to violate Commission rules, required 2 years 11 months to process). Meanwhile, the leased access programmer remains at the mercy of the cable operator – subject to whatever retaliation the cable operator chooses to inflict.

Small wonder then that few would-be programmers persevere through the double disincentive of cable stonewalling and Commission indifference to use commercial leased access. Unsurprisingly however, cable operators maintain that this low number of leased access programmers demonstrates that leased access simply does not reflect a viable business model. But, as the record reflects, a substantial number of low-power television (LPTV) licensees and others continue to use leased access to provide community-based programming. If these leased access programmers find it worthwhile to push through the mountain of obstacles created by cable operators to provide programming, imagine how many would-be programmers would use leased access if the Commission modified its rules and practices to make leased access the genuine outlet for programmers Congress intended.

ARGUMENT

Commenters here represent a broad range of independent programmers and would-be viewers of local and diverse programming. The National Alliance for Media Arts and Culture (NAMAC) represents thousands of individuals and organizations that produce video content seeking broader distribution. Religious organizations such as the United States Conference of Catholic Bishops have long used the media to broadcast religious programming and religious services. Media reform organizations, civil rights organizations, and organized labor continue to use the mass media to advocate their positions and promote diverse points of view. All these programmers and would-be programmers suffer from the failure of the Commission to give meaning to the Congressional mandate to make leased access a genuine outlet for diverse programming.

For similar reasons, NAMAC, *et al.*, urge the Commission to reform its enforcement process for Section 616. As the National Hispanic Media Coalition (NHMC) argued repeatedly in the course of the Adelphia Transaction proceeding, Comcast has consistently refused to carry locally produced programming designed to meet the needs of the Latino community. Favoring affiliated programming produced in

Mexico and elsewhere while refusing to carry unaffiliated domestically-produced programming designed to meet the needs of first and second generation Hispanic Americans is precisely the sort of discrimination Section 616 sought to address. Yet, as Commissioner Tate observed in her concurrence in the *Adelphia Transaction Order*, evidence from today's programming market shows that the discrimination banned by Section 616 remains a real concern. "[W]hen Hispanic-focused channels have trouble getting carriage in Los Angeles and other large Hispanic markets -- when I hear these and other similar reports I am far from convinced that cable providers are doing an adequate job in promoting a diversity of voices on television." *Adelphia Transaction Order*, 21 FCCrcd at 8374 (Concurring Statement of Commissioner Tate).

Again, the twin obstacles of staff indifference and cable retaliation prevent the vast majority of programmers from seeking redress from the Commission. The unfortunate experience of The America Channel (TAC), which incumbent cable operators continue to "blacklist" as a consequence of its participation in proceedings at the Commission,[4] reenforces what most programmers and would-be programmers already believe: using the FCC's carriage complaint process does no good and invites retaliation from the industry.

I. THE COMMISSION HAS AUTHORITY TO SUBSTANTIVELY REVISE ITS EXISTING LEASED ACCESS REGIME.

The Commission adopted the existing regulatory regime 10 years ago. *See In re*

[4]Despite securing carriage deals with cable overbuilders such as RCN and Verizon, not a single incumbent cable operator has agreed to carry TAC.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 12 FCCRcd 5267 (1997) ("*1997 Order*"). At the time, the Commission interpreted the statutory language as dictating a "balance" between the explicit goals of the statute to promote competition in the programming market and diversity of programming sources, Section 612(a), with the direction that rates and terms for leased access "not adversely affect the operation, financial condition, or market development of the cable operator." Section 612(c)(1). While recognizing that Congress intended to require a "genuine outlet" for programmers, *1997 Order* at 5308, an interest served by setting rates low, the Commission also determined that cable operators must receive compensation suitable to avoid an "adverse effect".

The *1997 Order* did not, however, address with any level of clarity how the Commission sought to protect cable operators from "adverse effects." The Commission alternately speaks of merely ensuring the "financial viability" of cable operators, *id.* at 5274, a fairly modest standard and one that comports with the plain meaning of the statute. Under this standard, as long as the rates and terms were not so ruinous as to endanger the financial viability of a cable operator, the Commission could impose terms that required cable operators to offer terms and observe conditions that did not fully recoup even actual costs. But the Commission also determined that "Congress did not intend for cable operators to subsidize leased access programmers." *Id.* At 52780. Thus, although the Commission acknowledged it had broader authority to impose rates and terms under the plain language of the statute, the Commission chose to err on the side of overcompensating cable operators to avoid the subsidy that it believed Congress did not intend (but did not prohibit). Accordingly, the Commission adopted a pricing formula that provided generous compensation for the Commission's estimate of both actual costs and potential "opportunity costs."[5]

In addition to this generous (and rather complex) compensation formula, the Commission also chose to give cable operators broad discretion in setting channel placement, charging fees, and conducting negotiations with leased access programmers. The Commission theorized that, based on the lack of experience with the existing leased access market, that it would serve both cable operators and leased access programmers to leave most such matters to the discretion of cable operators. In doing so, the Commission chose to ignore the bulk of the legislative history and its own experience with leased access, trusting that the limited restrictions and guidance offered by the Commission would allow leased access programmers and cable operators to embark on a free market journey of discovery. In the event this nudge to programming reconciliation proved ineffective, the Commission determined that enforcement actions would refine the ambiguities and eliminate inequities on a case-by-case basis. *Id.* at 53219-20. In *Valuevision International, Inc., v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998), the Court determined that the Commission's interpretation was "permissible" and therefore upheld its rate methodology and determination to leave

[5]Inconsistently the Commission also seems to have concluded that cable operators were entitled to an explicit profit on the leasing arrangement over and above mere compensation. *Id.* at 5283.

critical aspects of the negotiation of terms to the cable operators as "falling within the zone of reasonableness" to which a reviewing court must defer. *Id.* at 1212.

The Commission recognized in the *1997 Order*, however, that it lacked significant information and experience to have full confidence in its predictions – especially with regard to the use of the average implict fee formula it adopted. Accordingly, the Commission stated it would "continue to monitor the availability of leased access channels and may revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate." *1997 Order* at 5282.

A. The Experiences of the Last Ten Years Requires The Commission To Re-Examine It's Previous Conclusions And Expectations.

The last ten years have clearly demonstrated the Commission fundamentally miscalculated in its efforts to balance the interests of leased access programmers. The record is replete with examples of rampant abuse by cable operators and utter indifference by the Commission's staff. Contrary to the Commission's expectation, permitting cable operators and leased access programmers to engage in negotiations on a transaction by transaction basis has ***not*** resulted in lower prices and the removal of obstacles for leased access programers. To the contrary, as the record here plainly demonstrates, cable operators continue to use their superior resource and the lack of transparency in negotiations to force onerous terms on leased access programers willing to go to the expense of hiring legal counsel. Leased access programers cannot easily verify the expenses included in rates, and a combination of non-disclosure agreements and fear of retaliation prevents any information that might inform leased access programers in their negotiations from emerging. Rather than a joint free market journey of discovery, the current regulatory regime has created the classic conditions for disproportionate bargaining power, adhesion contracts, and extraction of monopoly rents.

Based on this record, the Commission has not merely the authority, but the obligation, to revise its regulations governing both terms and conditions for leased access. In doing so, the Commission should be mindful of the Congressional intent that "involving the FCC before leases are negotiated" should increase certainty and facilitate use of leased access channels. *See* Senate Report at 32. The Commission should also be mindful of the explicit intent of the statute to "promote competition in the delivery of diverse sources of video programming and to assure that the widest diversity of information sources are made available to the public from cable systems." Section 612(a).

B. New Technological, Economic, and Legal Developments Require Reassessment of Leased Access Regulations.

The NPRM explicitly solicits comment on how marketplace developments, technological developments, or other developments impact the Commission's leased access regulations. All of these factors direct the Commission to substantially reevaluate its leased access rules.

Marketplace factors. The continued consolidation in the industry has produced numerous impacts that negatively effect leased access programers and which require the Commission to "rebalance" the interests of leased access programmer and cable operators. Regional and national consolidation within the industry has concentrated power in the hands of cable operators to the detriment of leased access programers. Because of regional concentration, leased access programers cannot negotiate with multiple cable operators to compare leased access rates or pressure one cable operator to lower its rate because of the popularity of leased access programming on a neighboring system. *See Adelphia Transaction Order*, 21 FCCRcd at 8243 (recognizing value of multiple operators in a DMA to provide "benchmarks"on pricing and practices). Further, the consolidation of cable systems has lead to the consolidation of cable system head-ends, allowing cable operators to demand that leased access programers serve far more subscribers than desired for locally-created programming, making the cost of providing leased access programming prohibitive.

To the extent this regional and national consolidation has a silver lining, it should facilitate negotiation for regional or national coverage. Cable operators, however, have declined to make such rates available and required programers to negotiate on a system-by-system basis, or have made national rates available in a manner which precludes negotiation and provides no basis for leased access programmers to challenge the rates. Clearly, the Commission must reassess both its rate formula and its decision to leave discretion on negotiation of coverage area in the hands of cable operators.

Finally, studies of the cable industry have called into serious question the assumption of the Commission that leased access programming might "drive away" operators and thus impose an opportunity cost on cable operators. *See, e.g.,* Wise and

Duwadi, "Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks," 4 Journal of Competition Law and Economics 679 (2005) (identifying switching cost as the most critical factor in viewer decision and minimizing the importance of any single programming network). When these studies are combined with the fact that cable operators now offer a wealth of programming channels appealing to a variety of tastes without losing subcribers, any basis for believing that leased access programming might impose opportunity costs on cable operators by driving away viewers evaporates completely.

Technological Factors. Cable operators have stubbornly resisted all efforts to accommodate leased access programmers. Although cable systems are now capable of a wide variety of delivery systems, including Video on Demand (VoD) and other systems that would allow leased access programmers an opportunity to narrowly tailor their coverage to niche audiences, cable operators refuse to do so. Meanwhile, advances in the technology of programming production radically alter the feasibility of small programmers producing high quality programming and achieving economic viability by delivering this programming in a precise and pinpointed manner. *See, e.g.,* Saul Hansel, "Tuning Into the Potential for 'Slivercasting,' *New York Times*, March 12, 2005 at Section 3 p.1. Under the current rules, however, the public is denied this competitive and diverse programming in direct contravention to Congress' intent.

Similarly, the emergence of programming guides and DVRs has had significant impact on how viewers find and view video programming. Cable operators, however, consistently refuse to include necessary information in electronic program guides that would facilitate the features designed to find programming. Without this information, viewers cannot use DVR "favorite" lists or other search programs designed to find key words or identify programming by subject and viewer taste. Nor can viewers, surfing via channel guides, identify whether programming designated "paid programming" on a channel guide is desired local or ethnic programming or an infomercial for a new diet product.

As these new technologies increasingly shape viewer habits and the likelihood of viewers discovering new programming (or even consistently finding programming a viewer already wishes to watch), the refusal of cable operators to include leased access programers in program guides or permit them to offer programming via VoD excludes leased access programmers from an ever larger share of their target audience, to the continued detriment of both programmers and the public.

Finally, in the context of the Commission's assumptions that the possibility for "offensive" programming imposes an opportunity cost for which cable operators must be satisfied, the development of parental controls and channel blocking mechanisms eliminates any basis for this supposition. When combined with the ability of cable operators to reject obscene or even indecent programming, *see* Section 612(c)(2).

Legal Developments. Finally, the impact of state franchising laws is mirroring the impact of consolidation. As cable operators receive state franchises, they consolidate their head-ends. While this has obvious advantages from the perspective of the cable operator, it imposes significant costs on leased access programmers.

II. PROPOSED REVISIONS TO LEASED ACCESS REGULATIONS.

NAMAC, *et al.*, recommend the following substantive changes to the Commission's rules designed to address the deficiencies in the leased access and carriage complaint regimes cable operators have exploited to frustrate Congress' intent to promote a diverse and competitive programming market.

A. Rate Formula Modification, Elimination of Fees, and Enhanced Transparency.

The FCC must adopt rules that make the leased access process more transparent, affordable, and easy to use. These changes include modification of rates to reflect real costs rather than hypothetical costs, elimination of extraneous fees, and the creation of price sheets available in public files and on request. The Commission should also require cable operators to include leased access contracts in their public files and to provide annual reports on the use of leased access.

In the *1997 Order*, the Commission recognized the value of flat rate proposals, of transparency, and of simplicity. The Commission declined to adopt such proposals because it lacked empirical evidence that such "one size fits all" approaches were either necessary or desirable.

The record compiled here makes it clear why the Commission should favor a flat rate or, in the alternative, require that cable operators have prepared rate sheets freely available in advance. Cable operators rely on the lack of transparency in the process to hide illegal fees, to discourage use of leased access, and to prevent potential programmers from negotiating favorable rates.

To the extent the use of flat rates, increased reporting requirements, and elimination of fees creates uncompensated costs for cable operators, the Commission is fully justified by the record of the last ten years. Cable operators have made it clear that the Commission cannot hope to stop the abuses of leased access programers in any other less draconian fashion. It is simply inconceivable that a flat rate based on actual costs and the reduction in the cost of negotiations would create such uncompensated costs that it would threaten the financial viability of cable operators.

This interpretation is explicitly supported by Section 612(e)(2)-(3). These sections empower the Commission to make any "rule or order" necessary to address a pattern of abuse by a cable operator. Although the language of the statute is in the singular (referring to a cable "operator"), this broad authority to protect the "diversity of information required under this Section" is not so limited. It would be an odd result indeed if Congress gave the Commission broad authority to address a single violator, but left the Commission helpless to address an industry wide "pattern of abuse." In any event, even if the Commission does not find that Section 612(e) overrides the limitation of Section 612(c) that any rule not have an "adverse effect" on cable operators, it certainly informs how the Commission should balance the interests of cable operators, leased access programmers, and viewers seeking diverse programming. Rather than deliberately erring on the side of ensuring cable operators full compensation, the Commission should protect the "diversity of infromation required under this section."

Enhancing the ability of Programmers to Attract and Develop Audiences. Cable operators have used the discretion given them by the Commission to frustrate the ability of programmers to attract and develop audiences, a critical pre-requisite to making commercial leased access a "genuine outlet for programmers." Programmers should have the ability to select the tier of their choice and to be secure in their channel placement. Furthermore, with the growth of new technologies to deliver video programming and the increasing importance of technologies such as video guides and DVRs to subscriber viewing habits, the Commission must ensure that programmers have access to and benefit from these changes. The Commission should therefore require cable operators to lease VoD access and should provide a means for leased access programers to identify themselves in program guides and DVR search programs.

Finally, leased access programmers should have considerable discretion in the ability to select their target audience. The Commission should require cable operators to make rates available on a head-end, regional, and national basis. The Commission should also require cable operators to allow leased access programmers to target audiences by zip code or other reasonable means so that local and specialty networks can target audiences without incurring excess charges for unwanted subscribers the leased access programer anticipates will have little interest in its programming. Such mechanisms might include a requirement that a cable operator, at the request of a programmer, offer leased access channels on an "a la carte" basis.

These proposed changes directly address the concerns in the legislative history. The Senate drafters recognized that cable operators have every incentive to interfere with the ability of the programmer to establish itself with an audience because it has already determined – for whatever reason – not to carry the programming voluntarily. *See* Senate Report at 31. Furthermore, requiring a programmer to negotiate with many different cable systems would be a "hopeless task." *Id.* Ineed, of all the problems for leased access programmers, the Senate Report identifies the constant uncertainty over negotiations with cable operators as the most debilitating to the likelihood of success for a leased access programmer. *Id.* at 31-32. By adopting the changes suggested here, the Commission can bring much needed certainty and stability to leased access programmers.

Streamlining the Program Delivery Process. Cable operators routinely refuse to accept delivery of programming in ways convenient to leased access programmers, despite having the ability to do so. For example, although cable operators can receive the over-the-air signals of LPTV licensees, cable operators continue to insist that these programmers provide taped programming in advance rather than carrying the signal live as the LPTV licensee prefers. Because the cable operators have repeatedly abused the flexibility granted under the Commission's rules to frustrate the intent of Congress that leased access provide a genuine outlet for unaffiliated, diverse, and competitive programming, the Commission should require cable operators to accept programming via any means available at the discretion of the leased access programmer. To the extent this imposes new costs on the cable operator, the leased access programmer should bear these costs – but only to the extent necessary to recover actual costs and subject to a determination of reasonableness if contested.

Reforming the Commission's Complaint Process. The Commission's leased access complaint process and carriage complaint process require considerable modification to both effectuate the intent of Congress and to regain the trust of independent programmers. As an initial matter, the Commission should modify its rules so that the time does not begin to run on a complaint as long as the programmer and the cable operator remain in negotiation. Too often, a programmer faces the choice between filing a timely complaint or seeking to resolve the problems by further negotiations. Programmers should not have to chose between an arbitrary regulatory deadline and continued negotiation with a cable operator. Instead, the Commission should allow a programmer to bring a complaint only when the programmer decides negotiations have broken down irretrievably. In such instances, the Commission should consider the entire pattern of conduct by the parties and impose forfeitures if it finds that the cable operator violated explicit Commission rules in the course of the negotiation – even if the time for filing a complaint with regard to specific violations has passed.

Second, the Commission should codify the leased access remedies it imposed on Comcast and Time Warner in the *Adelphia Transaction Order* and make these applicable to the entire industry. In particular, leased access programmers should have the right to seek arbitration rather than rely on the Commission's enforcement staff – which has proven unreliable in the past. To the extent that the Commission retains the existing formula or modifications that require a determination of costs for each dispute, leased access programmers should have the right to discovery. The Commission should also impose a "shot clock" under which an arbitrator or

Commission enforcement staff must render a decision in 90 days or the complaint will be deemed granted, unless delay comes from the failure of the complainant to provide necessary information.

Finally, the Commission should consider adopting a policy of imposing significant forfeitures for cable operators that repeatedly fail to comply with leased access regulations, retaliate against complainants, or otherwise demonstrate a pattern of behavior designed to discourage or intimidate leased access programmers. Under the present system, a cable operator has everything to gain and nothing to lose from stonewalling, bullying and retaliating against leased access programmers. It is Economics 101 that an actor will engage in behavior that provides benefits at zero cost, even if such behavior violates existing regulations. Bluntly, if the Commission treats enforcement of its rules as a joke, so will the cable operators.

III. THE COMMISSION MUST REFORM THE CARRIAGE COMPLAINT PROCESS.

The carriage complaint process requires a similar regimen of remedies. The Commission should make arbitration available, permit discovery, impose a time limit for making decisions, and consider imposing significant forfeitures on repeated bad actors. In particular, the Commission must protect programmers from retaliation not merely from the cable operator named in the complaint, but from the industry incumbents generally. Historically, cable incumbents have acted in unison to punish "whistleblowers" or otherwise maintain their dominance. *See* Senate Report at 23-29. It takes only one or two such cases before programmers learn that whatever remedies they may have in theory, any effort to invoke them will ultimately result in the programmer's bankruptcy when the rest of the cable industry acts to suppress the programmer "troublemaker."

The Commission must recognize that this fear of retaliation and the skepticism that Commission staff have any interest in protecting independent programmers, rather then deep satisfaction with the existing status quo, has created the current paucity of complaints. When it takes more than one year and a brow-beating by the full Commission to inspire staff to process an "emergency complaint," as proved the case with the Mid-Atlantic Sports Network, programmers will prefer to try to mollify cable operators by meeting their illegal demands. If MASN were not sufficient example, the inability of The America Channel to invoke a merger condition ***expressly designed*** to expedite resolution of program carriage complaints sends a clear message to the programming community and cable operators alike that the FCC has no intention of enforcing Section 616. Only immediate action designed to demonstrate the Commission's sincerity in enforcing this Congressional mandate can convert what has until now been an empty promise into a genuine vehicle to promote competition and diversity.

CONCLUSION

Last year, prompted by the evidence in its review of the Adelphia Transaction, the Commission expressed its concern that market developments had proven that the rules it adopted for leased access were fundamentally flawed. The accumulation of the evidence of the market, combined with changes in the video marketplace, video technology, and other factors impacting programmers and viewers mandates a complete reevaluation of both leased access and the process of enforcement of Section 616.

Respectfully submitted,

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September 11, 2007